

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CINDY WILCKE and THOMAS BRYAN  
WILCKE,

Defendants.

No. CR99-4038-MWB

**ORDER REGARDING DEFENDANT  
CINDY WILCKE'S MOTION IN  
LIMINE**

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***I. INTRODUCTION AND BACKGROUND***

On September 28, 1999, a one-count superceding indictment was returned against defendants Cindy Wilcke and Thomas Bryan Wilcke charged them with conspiracy to manufacturer methamphetamine and possess of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 846. On February 4, 2000, a two-count second superceding was returned against defendants Cindy Wilcke and Thomas Bryan Wilcke charged them with conspiracy to manufacturer methamphetamine and possess of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 846, and possession of unlawful firearms while being an unlawful user of a controlled substance, in violation of 18 U.S.C. § 922(g)(3) and § 924(a)(2).

On November 17, 2000, defendant Cindy Wilcke filed her motion in limine. In her motion in limine, defendant Cindy Wilcke seeks to preclude the government from offering evidence that she was arrested and convicted of shoplifting two lithium batteries on March 23, 1999. The government has filed a timely response to defendant Cindy Wilcke's motion. The government indicates that defendant Cindy Wilcke's theft of lithium batteries is directly relevant as intrinsic evidence of the crime charged in Count 1 of the second superceding

indictment.

## ***II. LEGAL ANALYSIS***

### ***A. Timeliness Of Motion***

Defendant Cindy Wilcke's Motion In Limine is untimely. The court's scheduling order required that all motions in limine be filed two weeks prior to trial. Because trial of this case is due to commence on November 27, 2000, all motion in limine should have been filed no later than November 13, 2000. Therefore, defendant Cindy Wilcke's Motion In Limine is **denied** on that ground. Although the court need not do so, the court will alternatively proceed to address the merits of the motion.

### ***B. Res Gestae***

The Eighth Circuit Court of Appeals has instructed that

evidence of other crimes is admissible for the purpose of providing the context in which the crime occurred. We have sometimes called this evidence "res gestae" or "intrinsic" evidence. *United States v. Moore*, 735 F.2d 289, 292 (8th Cir. 1984). We have explained that when "evidence of other crimes is 'so blended or connected, with the one[s] on trial as that proof of one incidentally involves the other[s]; or explains the circumstances thereof; or tends logically to prove any element of the crime charged,' it is admissible as an integral part of the immediate context of the crime charged." *United States v. Bass*, 794 F.2d 1305, 1312 (8th Cir.) (quoting *United States v. Derring*, 592 F.2d 1003, 1007 (8th Cir. 1979)), *cert. denied*, 479 U.S. 869, 107 S. Ct. 233, 93 L. Ed.2d 159 (1986).

*United States v. Forcelle*, 86 F.3d 838, 841 (8th Cir. 1996) (footnote omitted). When evidence is admitted under *res gestae*, Federal Rule of Evidence 404(b) is not implicated. *See United States v. O'Dell*, 204 F.3d 829, 833 (8th Cir. 2000); *United States v. Riebold*, 135 F.3d 1226, 1228 (8th Cir.), *cert. denied*, 118 S. Ct. 2356 (1998); *United States v. LeCompte*,

108 F.3d 948, 952 (8th Cir. 1997). “Rule 404(b) governs the admission into evidence of ‘other crimes, wrongs, or acts.’ The rule applies only to ‘extrinsic’ and not to ‘intrinsic’ evidence.” *United States v. Swinton*, 75 F.3d 374, 377 (8th Cir. 1986); *see O’Dell*, 204 F.3d at 833; *United States v. Oakie*, 12 F.3d 1436, 1441-42 (8th Cir. 1993); *United States v. Severe*, 29 F.3d 444, 447 (8th Cir. 1994); *United States v. Bass*, 794 F.2d 1305, 1312 (8th Cir.), *cert. denied sub nom. Price v. United States*, 479 U.S. 869 (1986); *United States v. DeLuna*, 763 F.2d 897, 913 (8th Cir.), *cert. denied*, 474 U.S. 980 (1985).

Here, the circumstances surrounding defendant Cindy Wilcke’s theft of the lithium batteries is sufficiently intrinsic to permit the admission of Cindy Wilcke’s arrest under *res gestae*. First, Cindy Wilcke is charged here with conspiracy to manufacture methamphetamine and Cindy Wilcke’s arrest involved an item used in the manufacture of methamphetamine. Moreover, her arrest occurred during the pendency of the charged conspiracy. As the Eighth Circuit Court of Appeals pointed out in *Forcelle*:

In those cases in which we have approved the use of other crimes evidence as an integral part of the context of the crime charged, the other crime evidence was closely or inextricably intertwined with the charged crime. *See, e.g., United States v. Severe*, 29 F.3d 444, 447 (8th Cir. 1994) (evidence of drug delivery "inextricably intertwined" with the conspiracy charge), *cert. denied*, --- U.S. ---, 115 S. Ct. 763, 130 L. Ed.2d 660 (1995); *Bass*, 794 F.2d at 1313 (evidence was "closely intertwined with the entire criminal transaction"). We have often explained the other crime evidence "completes the story" or provides a "total picture" of the charged crime. *See, e.g., Ball*, 868 F.2d at 988 (evidence gave jury a "total picture" of defendant's state of mind).

*Forcelle*, 86 F.3d at 842. Here, finding that there is such a direct connection between the charged drug conspiracy and defendant Cindy Wilcke’s arrest for the shoplifting of lithium batteries, the challenged evidence is intrinsic to the conduct alleged in the indictment, and consequently, admissible as *res gestae* evidence. Therefore, defendant Cindy Wilcke’s Motion in Limine is also **denied** on this ground.

**C. Rule 404(b)**

Assuming, *arguendo*, that evidence of defendant Cindy Wilcke's arrest for the shoplifting of lithium batteries is inadmissible as *res gestae* evidence, Federal Rule of Evidence 404(b) "allows the use of evidence about 'other crimes, wrongs, or acts' if it has a bearing on any relevant issue other than the defendant's propensity toward criminal activity." *Forcelle*, 86 F.3d at 843; *see United States v. Powell*, 39 F.3d 894, 896 (8th Cir. 1994); *United States v. Kern*, 12 F.3d 122, 124 (8th Cir. 1993). As the Eighth Circuit Court of Appeals has pointed out:

Other acts evidence is not excluded by Rule 404(b) if it is: (1) relevant to a material issue raised at trial; (2) similar in kind and close in time to the crime charged; (3) supported by sufficient evidence to support a jury finding that the defendant committed the other act; and (4) its probative value is not substantially outweighed by its prejudicial value.

*United States v. Heidebur*, 122 F.3d 577, 588 (8th Cir. 1997); *accord United States v. Green*, 151 F.3d 1111, 1113 (8th Cir. 1998); *Forcelle*, 86 F.3d at 843; *Kern*, 12 F.3d at 124-25. Here, alternatively, the court concludes that the evidence of defendant Cindy Wilcke's arrest is admissible under Rule 404(b) for the purpose of proving intent, plan, preparation and knowledge. Therefore, defendant Cindy Wilcke's Motion in Limine is alternatively **denied** on this ground.

**IT IS SO ORDERED.**

**DATED** this 22nd day of November, 2000.

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MARK W. BENNETT  
CHIEF JUDGE, U. S. DISTRICT COURT  
NORTHERN DISTRICT OF IOWA